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full co-operation, either by advice, direction, or acts, in the mode of keeping the ram. All that it shows, either by statement or inference, is, that Spaulding did nothing about it after the sheep-washing—not so much as to inquire or interest himself to know where, or in what manner, his fellow-owner was keeping the ram. Being an owner of it, and knowing its propensity and habit of doing violence to persons, and being charged with the duty of effectually restraining it, and without protestation or counter-effort permitting it to be in the pasture of his co-owner, and voluntarily remaining ignorant both of the place and the manner in which it was kept, and under these circumstances it committed the alleged act of violence and severe injury, he failed utterly to fulfil the duty resting upon him, and stands as nakedly chargeable with liability for the damage done as if he alone had owned both the ram and the pasture in which the injury was done. To this view of the case the instructions of the County Court to the jury were applicable, and we think they were clearly correct.

The judgment upon the verdict for $1500 is affirmed.

Supreme Court of Michigan.

THE PEOPLE *v.* ROBERT GARBUTT.

Evidence—Insanity.—In a criminal case where insanity is set up as a defence, evidence that a brother of the accused has become insane from a cause similar to that which is claimed to have operated upon the accused, is admissible as having some tendency to prove the hereditary transmission of insane tendencies.

Insanity—Burden of proof in criminal cases.—In criminal cases the burden of proof rests upon the prosecution to establish all the conditions of guilt; and it does not shift to the prisoner where insanity is set up as a defence. In cases of homicide, the jury are to weigh all the evidence, and unless reasonably satisfied, not only that the prisoner committed the act charged, but also as to his criminal capacity and intent, their duty is to acquit.

It does not follow, however, that the prosecution are required to put in evidence of sanity before the defence has introduced evidence of the contrary condition. Sanity being the normal condition of humanity, the prosecution may rest upon the presumption that it exists, until evidence to rebut that presumption has been given.

Drunkenness is no legal excuse for the commission of crime.

Good character of the defendant in a criminal case.—Evidence of the good character of a defendant is always admissible in a criminal case, and when put in, the jury have a right to give it such weight as they think it fairly entitled to. Arbi-

trary rules for this purpose cannot be laid down for their control. In some cases on unblemished good character may not only raise a doubt as against the clearest case upon the other evidence, but may even bring conviction of innocence.

Requests to charge.—Counsel cannot be absolutely precluded from having proper instructions given to the jury, by a failure to hand in written requests before the argument, as desired by the judge. A direction to that effect by the judge ought to be complied with, when practicable; but its observance must rest in professional courtesy.

On exceptions from the Recorder's Court of *Detroit.*

The defendant was convicted in the Recorder's Court of the city of Detroit on an information charging him with the murder of one La Plante. No question was made that La Plante died of a wound from a pistol fired by defendant, but it was insisted on behalf of defendant that it was inflicted by him under circumstances of great provocation, sufficient to reduce the offence from murder to manslaughter; and it was further claimed that he was at the time mentally incompetent of a criminal intent, the reason being temporarily overthrown through the combined influence of intoxicating drinks, the great provocation, and perhaps of hereditary tendencies also.

Sylvester Larned, for the defendant.

W. L. Stoughton, Attorney-General, for the People.

The opinion of the court was delivered by

Cooley, C. J.—[After stating the case, and disposing of some unimportant exceptions.]

The most important questions arise upon the exclusion by the recorder of evidence offered to show the insanity of a brother of the prisoner, and upon his charge to the jury and refusals to charge as requested on behalf of defendant.

Those questions which relate to the discovery and proof of insanity in criminal cases are perhaps the most difficult of any with which courts and juries are compelled to deal. Mental disease is itself so various in character, so vague sometimes in its manifestations, and so deceptive, especially in its early stages, and its causes are so subtle and so difficult to trace, that the most experienced medical men are sometimes obliged to confess that however careful and thorough their investigations, they still prove unsatisfactory, leaving the mind not only in a condition of painful uncertainty upon the principal question whether mental

disease actually exists, but when its actual presence is demonstrated, failing utterly, in many cases, to trace it to any sufficient cause. This fact is very forcibly brought home to us by the conflicting views expressed on criminal trials by careful, experienced, and conscientious medical men, who, regarding the same state of facts in the light of their scientific investigations and actual but diverse experience, are forced to express different views, in consequence of which juries, in these difficult cases, are sometimes left in a state of greater doubt and difficulty, if possible, than if no such evidence had been given. The case of *Freeman* v. *People*, 4 Denio 9, and the more recent and noted case of the forger Huntingdon, are conspicuous instances in illustration of this truth, but others will readily occur to the mind.

The defence sought to show hereditary tendency to insanity on the part of the defendant. That insane tendencies are transmitted from parent to child, there is no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible, either in civil or criminal cases (*McAdam* v. *Walker*, 1 Dow. P. C. 148, 174; Chitty's Med. Juris. 354–5), yet this ruling has since been rejected as unphilosophical and unsound, and it is now allowed to prove the insanity of either parent, or even of a more remote ancestor, since it is well established that insanity sometimes disappears in one generation and reappears in the next: Taylor's Med. Juris. 628–9, and cases cited; Whart. & Stillé's Med. Juris. 85, *et seq.*

In the case at bar it was not claimed that either parent, or any other ancestor, had been insane, but the defence offered to show that insanity had been developed in a brother arising from a cause similar to that which, it was alleged, had induced the destructive act of the defendant; and this fact was sought to be placed before the jury as throwing some light on the defendant's conduct and accountability.

Although this evidence could not be very satisfactory in character, we think it was legally admissible. It is now generally believed that other things besides actual mental disease in the parents may cause the transmission of taints to their offspring, which result in some cases in idiocy or insanity. The children of habitual drunkards are thought to be much more susceptible to mental disease than those of persons whose habits have been cor-

rect and regular, and the medical opinion has been expressed that the children of those who are married late in life are also more subject to insanity than those born under other circumstances: Taylor's Med. Juris. 629. But it sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively from the parentage. Melancholy examples of this fact are presented sometimes in the case of the intermarriage of near relatives. The reasons for this are not fully understood, and cannot be explained. We can only say of such cases, that observation teaches us the existence of a law of nature which cannot be broken with impunity, but the full boundaries, extent, and force of which we are as yet unable to fully comprehend, point out, or explain. But there are other cases where we may be able to discover effects without the ability to point out either the law or the causes which produce them. What peculiar combination of qualities in parents may tend to produce mental perversion, weakness, or disease in children, must for ever remain, in many cases, matter of profound mystery. If a family of several children should be found, without known cause, to be idiotic, or subject to mental delusions, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to demonstration. In some cases its force must be small; in others it will prove hereditary taint with great directness. We think evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question, is admissible, and that the jury should be allowed to consider it in connection with all the other evidence bearing upon that subject.

The counsel for the defendant requested the court to charge the jury that if they believed the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the offence, the defendant must be acquitted. A doctrine like this would be a most alarming one to

admit in the criminal jurisprudence of the country, and we think the recorder was right in rejecting it. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real it so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognised it as an excuse for crime: *Commonwealth* v. *Hawkins*, 2 Gray 463; *United States* v. *Drew*, 5 Mason 28; *People* v. *Hammill*, 2 Parker 223; *Pirtle* v. *State*, 9 Humph. 663. Whether all the charges given by the recorder on this subject were correct, we do not feel called upon to consider; as the only exception to the charge as given was a general one to the whole charge, which is not sufficient, when a part of it is correct, to raise questions upon other parts.

The defendant's counsel also requested the court to charge the jury that sanity is a necessary element in the commission of crime, and must be proved by the prosecution as a part of their case whenever the defence is insanity. Also, that where the defence makes proof of insanity, partial or otherwise, whenever it shall be made to appear from the evidence that prior to or at the time of the offence charged, the prisoner was not of sound mind, but was afflicted with insanity, and such affliction was the efficient cause of the act, he ought to be acquitted by the jury. These requests were refused.

It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defence, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defence of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defence, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a

preponderance of testimony, that he was incapable of criminal intent at the time the act was done: *Regina* v. *Taylor*, 4 Cox C. C. 155; *Regina* v. *Stokes*, 3 C. & K. 188; *State* v. *Brinyea*, 5 Ala. 241; *State* v. *Spencer*, 1 Zab. 202; *State* v. *Stark*, 1 Strob. 479. These cases overlook or disregard an important and necessary ingredient in the crime of murder, and they strip the defendant of that presumption of innocence which the humanity of the law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered. Thus, in *Regina* v. *Taylor*, *supra*, it is said: "In cases of insanity, there is one cardinal rule, never to be departed from, viz.: that the burden of proving innocence rests on the party accused." And in *State* v. *Spencer*, *supra*, the rule is laid down thus: "Where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act ought to be clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be in order to find a sane man guilty." These cases are not ambiguous, and, if sound, they more than justify the recorder in his charge in the case before us.

The defendant was on trial for murder. Murder is said to be committed when a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied: 3 Coke Inst. 47; 4 Bl. Com. 195; 2 Chit. Cr. L. 724. These are the ingredients of the offence; the unlawful killing, by a person of sound mind and with malice, or to state them more concisely, the killing with criminal intent; for there can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

These, then, are the facts which are to be established by the prosecution in every case where murder is alleged. The killing alone does not in any case completely prove the offence, unless it was accompanied with such circumstances that malice in law or in fact is fairly to be implied. The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a

part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent.

It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent on the part of the defendant; or enter upon the question of sanity before the defence have controverted it. The most conclusive proof of malice will usually spring from the circumstances attending the killing, and the prosecution could not well be required in such cases to go further than to put those circumstances in evidence. And on the subject of sanity, that condition being the normal state of humanity, the prosecution are at liberty to rest upon the presumption that the accused was sane, until that presumption is overcome by the defendant's evidence. The presumption establishes, *primâ facie*, this portion of the case on the part of the government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty.

This question of the burden of proof as to criminal intent was considered by this court in the case of *Maher* v. *The People*, 10 Mich. 212, and a rule was there laid down which is entirely satisfactory to us, and which we have no disposition to qualify in any manner. Applying that rule to the present case, we think the recorder did not err in refusing to charge that proof of sanity must be given by the prosecution as a part of their case. They are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh, and pass upon it with the understanding that although the initiative in presenting the evidence is

taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt. Upon this point the case of *People* v. *McCann*, 16 N. Y. 58, is clear and satisfactory, and the cases of *Commonwealth* v. *Kimball*, 24 Pick. 373; *Commonwealth* v. *Dana*, 2 Met. 340; *State* v. *Master*, 2 Ala. 43; *Commonwealth* v. *McKee*, 1 Gray 61; *Commonwealth* v. *Rogers*, Id. 500; and *Hopps* v. *People*, 31 Ill. 385, may be referred to in further illustration of the principle. See also *Doty* v. *State*, 7 Blackf. 427. The recent case of *Walter* v. *People*, 32 N. Y. 147, does not overrule the case of *People* v. *McCann*, but so far as it goes, is entirely in harmony with the views here expressed.

The only remaining error alleged relates to the refusal of the recorder to charge as requested upon the evidence adduced by the defendant to establish his uniform good character previous to the time of the alleged offence. To understand this refusal it must be known that the counsel for the defendant had previously been informed by the court that any requests to charge the jury should be handed in before he commenced his argument to the jury. In compliance with this direction, seven written requests were handed in, which were appropriately responded to. None of these related to good character. The court, however, in the charge alluded to the proof of good character, coupling it with a caution to the jury not to give too much weight to the statement the prisoner had made in the case, and which must be considered as made under strong temptations to state that which was untrue in his own exculpation. After this charge was given, the court was asked to instruct the jury that they had a right to believe the defendant's statement in opposition to sworn evidence; and this charge was given, with a repetition of the caution above stated. The court was then further requested to charge that, as to good reputation, it is for the jury to consider whether such reputation tends to rebut the presumption of malice. The court refused to give the charge, on the ground that it might mislead the jury without further explanation, which the court did not feel bound then to give.

We infer from the bill of exceptions that the recorder declined to give what he regarded as proper instructions on this point because the request was not handed in at a prior stage of the case. As a legal proposition, however, the refusal could hardly be jus-

tified on this ground. It is undoubtedly proper that requests to charge should be handed in by counsel before they go to the jury upon the facts; and a rule by the court to this effect ought to be regarded as binding by counsel. Fairness to the judge, and common courtesy, would require that such a rule be complied with, that he may have opportunity to carefully weigh his instructions, and to reduce them to writing if he shall so desire. Counsel who should decline to obey so reasonable a request might justly be regarded as wanting in that courtesy which distinguishes the members of the profession generally in their intercourse with each other, and which is especially due from the bar to the judges who endeavor patiently to administer the law with impartiality amid all the difficulties and embarrassments that sometimes surround the trials by jury. Nevertheless the rule cannot be laid down as an unbending rule of law. The necessity for a request to charge will sometimes arise from what has already been charged by the judge. It may become important in order to render more clear and explicit that which he has already stated, but which has fallen short of a complete exposition of the law upon the point to which his remarks have been addressed. And if in any case the counsel should fail to request the court to lay down those familiar rules of law which it is always to be expected will be given in the cases in which they were applicable—such as the necessity of malice in murder, or a breaking in burglary—the defence could not justly be precluded by such omission from having the proper instructions given.

It is quite possible that in the present case counsel took it for granted that the proper instructions would be given on the subject of the proof of character without any request to that effect. With many judges it is a matter of course to give such instructions, and it is to be presumed the recorder would have done so in the present case had it occurred to him as important. But we think the request of counsel did not come too late in this instance, and he was entitled to have the proper instructions given.

We also think the instructions requested were correct in substance, and that the defendant was entitled to them without explanation or qualification. The whole request was that the jury be instructed that they had a right to consider whether the evidence of good character tended to rebut the presumption of malice. That the evidence was admissible in the case was un-

questionable; but it was equally unquestionable that it could have no bearing whatever except upon the question of malicious intent. To refuse the instruction, therefore, seems to us equivalent to holding, or at least to leaving the jury to infer, that the evidence which was lawfully put into the case was immaterial after it was in.

The instruction is often given in these cases that proof of good character is not to be allowed to weigh against evidence which in itself is satisfactory, and Mr. Starkie has said, "it ought never to have *any* weight except in a doubtful case:" 1 Stark. Ev. 75. Such instructions are well calculated to mislead. Good character is an important fact with every man, and never more so than when he is put on trial charged with an offence which is rendered improbable in the last degree by an uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but may bring conviction of innocence. In every criminal case it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give it such weight as they think it entitled to. Chief Justice SHAW has pointed out in the *Webster Case* how important it is in the case of some minor offences, and he adds that, "even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution:" *Commonwealth* v. *Webster*, 5 Cush. 295. In some cases it may have even this great effect.

The difficulty at this point lies in attempting to surround the jury with arbitrary rules as to the weight they shall allow to evidence which has properly been placed before them. This court has several times found it necessary to declare that no such arbitrary rules are admissible. We refer particularly to the cases of

People v. *Jenners*, 5 Mich. 305; *Maher* v. *People*, 10 Id. 212; and *Durant* v. *People*, 13 Id. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts and weigh the evidence. The law has established this tribunal because it is believed that from its members, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common-sense view of a set of circumstances involving both act and intent, than any single man, however pure and eminent he may be. This is the theory of the law, and as applied to criminal accusations it is eminently wise and favorable alike to liberty and to justice. But to give it full effect the jury must be left to weigh the evidence and to examine the alleged motives by their own tests. They cannot properly be furnished for the purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist.

Upon a full consideration of this case, we are compelled to say we find some errors in the record, for which the conviction should be set aside, and a new trial awarded.

Supreme Court of Wisconsin.

NATHANIEL W. DEAN, Appellant, *v.* WILLIAM CHARLTON, Treasurer, &c., and Others, Respondents.[1]

Where a city charter required that all work should be let by contract to the lowest bidder, *held*, that the city authorities could not contract at all for laying the Nicholson pavement, the right to lay it being a patented right and owned by a single firm, and, therefore, the work being one which could not be open to competition.

Paine, J.—This was a bill in equity to enjoin the sale of the plaintiff's lands for an assessment imposed upon them for paving the streets in front of them with what is known as the Nicholson pavement. It is claimed that the proceedings failed in several

[1] We are indebted for the opinion in this case to the Hon. O. M. Conover, Reporter for the State of Wisconsin.—Eds. Am. Law Reg.